(Slip Opinion)

NOTICE: This opinion is subject to formal revision before publication in the Environmental Administrative Decisions (E.A.D.). Readers are requested to notify the Environmental Appeals Board, U.S. Environmental Protection Agency, Washington, D.C. 20460, of any typographical or other formal errors, in order that corrections may be made before publication.

BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	)	
Slinger Drainage, Inc.	)	CWA Appeal No. 98-10
Docket No. 5-CWA-97-022	)	

[Decided September 29, 1999]

FINAL DECISION

Before Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum, and Kathie A. Stein.

SLINGER DRAINAGE, INC.

CWA Appeal No. 98-10

FINAL DECISION

Decided September 29, 1999

Syllabus

Respondent Slinger Drainage, Inc. ("Slinger") is in the business of installing drainage tile. It used a Hoes Trenching Machine to install 26,000 linear feet of drainage tile over a 50-acre area of a wetland for the purpose of draining the wetland and converting it to farming use. The machine uses a "chainsaw-type blade" with a circulating chain on an arm to dig a trench into the wetland soil. The chain momentarily lifts the soil out of the ground to create a trench into which a continuous line of drainage tile is fed by the machine. Approximately 50% of the soil that is removed to create the trench is immediately dropped back into the trench, and the remaining 50% is left momentarily on the side of the trench. The machine then immediately pushes most of the latter quantity back into the trench with concave-type disks, which are attached to the rear of the machine. All of these steps are carried out as part of a unified process as the machine traverses the field. Subsequently, a tractor blade returns to the trench any small bits of material still remaining on the side of the trench. This process results in the excavated material being returned to the trench. Slinger did not apply for a permit under the Clean Water Act before undertaking the activity that is the subject of this proceeding.

EPA Region V ("the Region") filed an administrative complaint against Slinger alleging that the company had violated CWA section 301(a), 33 U.S.C. § 1311(a), by failing to obtain a permit from the U.S. Army Corps of Engineers ("Corps") as required under CWA section 404, 33 U.S.C. § 1344, before discharging a pollutant -- in this case dredged spoil -- into a wetland. Central to the Region's allegation was that Slinger's activities caused an "addition" of dredged material to the wetland, thereby satisfying the definitional requirements of a regulable "discharge" under the statutory language and implementing regulations under section 404. The Region proposed a penalty amount of $90,000.

Following an oral evidentiary hearing, the Presiding Officer found Slinger liable as alleged and assessed a penalty of $90,000.

On appeal, Slinger maintains that while it excavated dredged material, a CWA pollutant, its redeposit of such material involved not a regulable "discharge" or "addition" under the statute but rather "incidental fallback," the regulation of which was allegedly precluded by *National Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399 (D.C. Cir. 1998) ("*NMA*"). *NMA* upheld a district court's decision permanently enjoining EPA and the Corps from enforcing the so-called Tulloch Rule, 40 Fed. Reg. 45,008 (Aug. 25, 1993), which defined the "discharge" of dredged materials to include "any redeposit" of such material. *NMA* held that the Tulloch Rule was beyond the scope of the agencies' authority under the CWA to the extent the rule asserted authority over redeposits that consist same only of "incidental fallback," because such fallback does not amount to a regulable "addition" of material under the CWA. *NMA* described "incidental fallback" as an "inescapable byproduct" of removal activities such as dredging, landclearing and excavation that occurs when small amounts of soil or sediment fall back into the water to virtually the spot from which they originated. 145 F.3d at 1403. Emphasizing that the CWA only regulates "discharges" and not removal, *NMA* held that the Tulloch Rule impermissibly extended the CWA's authority to removal activities, such as dredging, that are within the proper purview of section 10 of the Rivers and Harbors Act of 1899. Citing *NMA*, Slinger asserts that its activities resulted in "incidental fallback" because its redeposits of dredged material were "incidental" to the laying of drainage tile and resulted in redeposit of the material to its original location. As such, Slinger maintains that its activities are not regulable under CWA section 404.

Slinger also challenges its liability by arguing that its activitie did not cause sufficient disturbance to the wetland to constitute a regulable discharge under the CWA. Specifically, Slinger states that since it did not bring new material from outside the wetland nor move material from one part of the wetland to another, but merely restored dredged material to its original location, no "addition" of material took place.

Alternatively, in the event the Board disagrees with it on the issue of liability, Slinger asserts that the $90,000 penalty is "unconscionable."

HELD: (1) *NMA* is not applicable to Slinger's activities and therefore does not preclude their regulation. In contrast with the "incidental fallback" of small amounts of excavated material at issue in *NMA*, Slinger's activities involved the redeposit into a trench of 100% of the material removed from it -- approximately 2,900 cubic yards. Further, Slinger's redeposits were not an unavoidable "byproduct" of a larger removal action that lay beyond the regulatory reach of the CWA; instead, the redeposits constituted a discrete step and purposeful operation essential to the success of the drainage project. While *NMA* is not applicable to Slinger's activities, today's decision is nonetheless consistent with *NMA*. The *NMA* court indicated that it would defer to a

"reasoned attempt" by the Agency to distinguish between regulable deposits and nonregulable incidental fallback, *NMA*, 145 F.3d at 1405, and there is no reason to believe the redeposits here do not clearly fall on the regulable side of the line.

(2) A textual reading of the applicable Agency and Corps regulations supports treatment of Slinger's redeposits of dredged material as an "addition" of a pollutant, thus establishing the company's CWA liability. By excavating material *from* the wetland, thereby creating a pollutant as defined by the regulations, and subsequently discharging the pollutant *into* the wetland, as also defined by the regulations, Slinger necessarily "added" a pollutant to the wetland. Therefore the company's activities are regulable under CWA sections 301(a) and 404.

(3) The Presiding Officer's penalty assessment, which considered all the necessary statutory factors, contains no obvious errors, and Slinger has provided no support for its contention that the assessment is "unconscionable." Therefore, the $90,000 penalty assessment is affirmed.

Before Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum, and Kathie A. Stein.

Opinion of the Board by Judge McCallum:

Slinger Drainage, Inc. ("Slinger"), the Respondent in an administrative complaint proceeding instituted by the Water Division Director of Region V, U.S. Environmental Protection Agency ("EPA Region V"), is appealing from an initial decision in which the Presiding Officer found it liable, as alleged in the complaint, for illegally discharging a pollutant, specifically, dredged soil and organic materials, into a wetland that is part of the waters of the United States. Section 301(a) of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1311(a), prohibits this type of discharge unless it occurs in compliance with a permit issued by the U.S. Army Corps of Engineers (the "Corps") pursuant to section 404 of the Act, 33 U.S.C. § 1344. Slinger did not have a permit at the time

of the discharge and had never applied for one. The Presiding Officer assessed a civil penalty against Respondent in the amount of $90,000.[1]

I.

Slinger is in the business of installing field drainage tile.[2] In this instance, the installation work was done at the behest of a farmer who sought to transform a wetland portion of his farm into a viable dryland crop production area.[3] The precise means by which Slinger installs drainage tile is highly relevant to the liability issue, since the means of installation help determine whether a prohibited "discharge" took place -- an issue of central importance. Slinger employs a "Hoes Trenching Machine," which, as part of a continuous and unified process, digs a trench, lays a continuous line of drainage tile in the bottom of the trench, and then redeposits the excavated material back into the trench. More specifically, the machine uses a "chainsaw-type blade" with a circulating chain on an arm to dig a trench into the wetland soil. The chain momentarily lifts the soil out of the ground to create a trench into which the tile is fed by the machine. Approximately 50 percent of the soil that

---

[1]Civil penalties may be assessed administratively by EPA pursuant to section 309(g) of the CWA, 33 U.S.C. § 1319(g), against persons who violate, *inter alia*, the prohibition in section 301(a) of the CWA.

[2]The names, dates, jurisdictional and other important factual details relevant to the complaint against Slinger are spelled out in the initial decision. Unless otherwise noted, we adopt the findings of fact in the initial decision. In addition, we note that in the proceedings below the parties entered into several factual stipulations. *See* Joint Stipulations of Fact and Regarding Documents,("Stip") (filed May 12, 1998). The parties also stipulated to the "authenticity and admissibility" of 66 exhibits. *Id.;* Trial Tr. at 207.

[3]We spell dryland as one word simply to place it on an orthographic par with wetland. The term "upland," in lieu of "dry land" or "dryland," is sometimes used in the regulations to describe land that does not have wetland characteristics and is not part of the waters of the United States. *See, e.g.*, 40 C.F.R. § 232.3(d)(3)(i)(A).

is removed to create the trench is immediately dropped back into the trench, and the remaining 50 percent is left momentarily on the side of the trench. The machine then immediately pushes most of the latter quantity back into the trench with concave-type disks, which are attached to the rear of the machine. All of these steps are carried out as part of a unified process as the machine traverses the field.[4]

In this instance, the machine dug trenches to lay approximately 26,000 linear feet of tile over a 50-acre area of the farm. The trenches are thirteen inches wide and vary in depth from 4 to 6 feet. The tile itself is perforated and ranges from 4 to 6 inches in diameter, with the larger tiles running out from the perimeter drainage ditches (dug by another contractor prior to the tile installation), and the smaller ones running off of individual 6-inch tiles. The tile is laid out in a pattern best suited to take advantage of the flow characteristics of the terrain. The project was designed to convey water collected in the tiles into the perimeter drainage ditches and then into a nearby waterway known as the Town

[4]According to the testimony of Mr. Charles Slinger, President and sole owner of Slinger Drainage, Inc., "most" of the 50 percent that remains briefly on the side of the trench "is put back in with concave disks behind the machine. What isn't, is put in with a blade on a tractor." Trial Tr. at 183 (direct examination). On cross-examination, Mr. Slinger acknowledged that "small bits" of soil remain on the surface after the disks on the back of the machine have forced the bulk of the material back into the trench. Trial Tr. at 211 (cross-examination). Based on a comparison of his testimony on direct and cross-examination, we deduce that any remaining "small bits" not returned to the trench by the concave disks on the machine are returned to the trench by the tractor blade. Our search of the record (including stipulations) has not turned up any evidence, notwithstanding the recollections of counsel for EPA Region V to the contrary, Oral Arg. Tr. at 43, of quantities of soil remaining on the sides of the trenches after the Hoes Trenching Machine and tractor blade complete their work.

Ditch. Eventually, it was expected that the drained area would be transformed from a wetland into dryland.[5] Neither Slinger nor the farmer applied to the Corps for a permit under section 404 of the CWA.

A.

The text of section 404(a) of the CWA reads, in pertinent part, as follows:

> The [Corps of Engineers] may issue permits, after notice and opportunity for public hearings[,] for the discharge of dredged or fill material into the navigable waters[6] at specified disposal sites.

33 U.S.C. § 1344(a). This provision of the Act operates under the umbrella of section 301(a), which makes it unlawful for any person to "discharge" any "pollutant" into waters of the United States except in compliance with certain enumerated provisions of the Act, one of which

---

[5]Federal regulations define "wetlands" as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas." 40 C.F.R. § 230.3(t). The wetland in this case has been identified by the State of Wisconsin as within a system that is important for purposes of stemming nonpoint source pollution of waterways and protecting wildlife habitat associated with wetlands. Initial Decision at 4.

[6]The term "navigable waters" is defined in the Act and has a meaning that extends well beyond what is traditionally embraced by the concept of navigable-in-fact waters. The subtleties associated with the meaning of the term need not be addressed in this decision, however, for Slinger does not dispute the status of the affected wetlands as meeting the definition. Stip. No. 15. It suffices to note that the Supreme Court has stated that Congress, in defining "navigable waters" as "waters of the United States," intended to "exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985).

is section 404. The term "pollutant" is defined broadly in the Act and includes, but is not limited to, "dredged spoil * * * discharged into water." CWA § 502(6), 33 U.S.C. § 1362(6). The term "dredged spoil" is not further defined in the Act, but the term used in its stead in the regulations, "dredged material," is defined as material that is removed "from" a body of water by means of excavation or dredging:

> "Dredged material" means "material that is excavated or dredged from waters of the United States."

40 C.F.R. § 232.2. Because Slinger does not dispute that it removed soil from a wetland by means of excavation (albeit only momentarily),[7] dredged material is unquestionably the pollutant at issue in the instant proceeding.

The term "discharge of a pollutant" is also defined in the Act, and is the principal, statutorily defined term at issue in this case:

> The term "discharge of a pollutant" * * * means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

CWA § 502(12), 33 U.S.C. § 1362(12).[8] The term "addition," as it appears in the foregoing section of the Act, is not separately defined

---

[7] "The soil displaced at the Site by the Hoes Trenching Machine in July 1994 was composed primarily of organic soils." Stip. No. 6.

[8] The parties have stipulated that the Hoes Trenching Machine is a "point source," defined in section 502(14) of the Clean Water Act as including "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well [or] discrete fissure * * * from which pollutants are or may be discharged."

elsewhere in the statute or regulations.[9] The meaning of the term has assumed a prominent role in the case, for Slinger argues, both on appeal and below, that its tile-laying activities did not result in an addition of a pollutant to waters of the United States, and, hence, no discharge of a pollutant occurred requiring a permit under section 404.

The section 404 regulations replace the statutory term "discharge of a pollutant" with the context-specific term "discharge of dredged material," which the regulations in turn define as dredged material that is added back, or redeposited, "into" a body of water:

> [T]he term *discharge of dredged material* means any addition of dredged material into, including any redeposit of dredged material within, the waters of the United States. The term includes, but is not limited to, the following: * * * (iii) Any addition, including any redeposit, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation.

40 C.F.R. § 232.2; 33 C.F.R. § 323.2(d). Like its statutory counterpart, this regulation also does not define the term "addition"; however, the relationship between the regulatory definition of "dredged material"

---

[9]The Corps and EPA have shared responsibility for administering this section of the Act, with the Corps having general responsibility over permit issuance and EPA having the right to veto any Corps-issued permits. *See generally* CWA § 404(a), (c), (n), 33 U.S.C. § 1344(a), (c), (n). Although both are authorized to exercise certain enforcement powers, EPA has exclusive authority to institute administrative civil penalty proceedings under CWA § 309, 33 U.S.C. § 1319. The Corps and EPA have issued extensive regulations implementing and interpreting section 404 of the CWA. These regulations provide insight into the meaning of the statutory provisions, flesh out some of the terms, and have the force of law. As noted, however, they do not separately define the term "addition."

(material that is removed "from" a body of water by means of excavation or dredging) and the regulatory definition of "discharge of dredged material" (dredged material that is added back, or redeposited, "into" a body of water) does shed light on whether an addition to the wetland took place as the result of Slinger's activities. This relationship is addressed later in this opinion in the discussion of *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997), a case cited by Slinger in support of its position.

B.

The Presiding Officer found Slinger liable for discharging dredged soil and organic materials without first obtaining a permit from the Corps pursuant to section 404 of the CWA. He rejected Slinger's arguments that movement of soil and organic matter was not a discharge but only incidental to the laying of the tile. Among other things, the Presiding Officer held that "[t]he redeposit of materials excavated from a wetland is the addition of pollutants under the CWA, *United States v. Huebner*, 752 F.2d 1235, 1243 (7th Cir. 1985)"; and "the Corps of Engineers has consistently interpreted the CWA to require a permit for the type of activity found in this case." Initial Decision at 8. Further, he rejected Slinger's contention that the D.C. Circuit's ruling in *National Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399 (D.C. Cir. 1998) (hereafter "*NMA*"), was applicable to this case, observing that the material that Slinger excavated was not "incidental fallback" within the meaning of *NMA*. Very briefly-- for *NMA* is discussed at length later on -- the court in *NMA* affirmed a district court decision permanently enjoining EPA and the Corps from enforcing the so-called Tulloch Rule, 40 Fed. Reg. 45,008 (Aug. 25, 1993), which incorporated the "any redeposit" language into the definition of discharge of dredged materials.[10] The court held that "by asserting jurisdiction over 'any

[10]EPA and the Corps subsequently revised the definition of discharge of dredged material to bring it into conformity with the *NMA* decision. The definition now reads in relevant part as follows:

(continued...)

redeposit,' including incidental fallback, the Tulloch Rule outruns the Corps's statutory authority." *NMA*, 145 F.3d at 1405. The Presiding Officer, in rejecting Slinger's argument that *NMA* was applicable, observed:

> Moreover, there is no evidence that Respondent [Slinger] removed the dredged material from the site and intended to leave only that [which] fell back into the waterway. All the soil which Respondent dredged or excavated was redeposited in the waterway.

Initial Decision at 6. Because he found that the redeposit was not incidental, as Slinger contends, the Presiding Officer concluded that the present case is distinguishable from the fact pattern considered in *NMA*.

C.

In support of its position on appeal that there was no discharge of pollutants because there was no addition of pollutants to the wetland, Slinger points to the fact that it did not bring any soil or other material to the work site, nor did it remove any soil or other material from a non-

---

[10](...continued)

> [T]he term *discharge of dredged material* means any addition of dredged material into, including redeposit of dredged material other than incidental fallback within [sic], the waters of the United States. The term includes, but is not limited to, the following: * * * (iii) Any addition, including redeposit other than incidental fallback, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation.

See Revisions to the Clean Water Act Regulatory Definition of "Discharge of Dredged Material," 64 Fed. Reg. 25,120, 25,123. (May 10, 1999) (revising 40 C.F.R. § 232.2 and 33 C.F.R. § 323.2(d)).

wetland portion of the site and relocate it to a wetland portion. Critical to its view of the case is "whether or not the soil disturbed in placing tile by use of a Hoes Trenching Machine is disturbed in such a way as to fit within the definition of 'discharge' under the Clean Water Act. Regardless of whether the soils within a wetland fit within the definition as a 'pollutant,' there is no violation in this case if those soils were not 'discharged' into the wetland." Slinger App. Br. at 5. Further, "[p]lacing tile by use of a Hoes Trenching Machine does not add anything to the wetland. The Machine lays the tile and leaves. It brings nothing into the wetland and takes no part of the wetland and removes it to another part of the wetland." *Id*. at 6. Continuing, Slinger states, "[t]he soil moved by a Hoes Trenching Machine in placing tile, drops the soil or material excavated directly back into the same location in the same wetland. It cannot be said that this soil is an addition to the wetland." *Id*. at 7.

Slinger also argues on appeal that *NMA* effectively enjoins EPA from regulating the placement of tile by use of a Hoes Trenching Machine.[11] Slinger asserts that the redeposition of soil that takes place using the Hoes Trenching Machine is "incidental fallback," Trial Tr. at 8, i.e., "incidental" to the tiling project itself, Oral Arg. Tr. at 22, and is not regulable under section 404.[12] Accordingly, Slinger argues that the finding of liability by the Presiding Officer should be overturned.

---

[11]The Board granted EPA Region V's motion for oral argument in this case expressly to "assist it in its deliberations over the pivotal issue of whether the Agency has jurisdiction, under CWA section 404, over Slinger's wetland dredging activities in light of the recent decision in *NMA*." Order Scheduling Oral Argument (EAB, Mar.12, 1999).

[12]Nowhere in its appellate brief or at oral argument (or for that matter, in its brief before the Presiding Officer) does Slinger explain exactly why it believes *NMA* operates to "effectively enjoin" EPA and the Corps from requiring a section 404 permit when installing drainage tile by means of a Hoes Trenching Machine. In addition, Slinger even appears to contradict itself on the question of whether it believes the installation produces "incidental fallback" as described in the Tulloch Rule and *NMA*. *Compare* Oral Arg. Tr. at 22 *with id. at* 25.

Alternatively, if the Board disagrees with it on the issue of liability, Slinger asserts that the penalty is "unconscionable" (but does not recommend a reduction by a specific amount).

On appeal, EPA Region V does not dispute the facts as described earlier and does not disagree with Slinger's assertions that it did not bring any material to the work site or remove any from the site to another location. EPA Region V does however view the physical movement of the wetland soil that occurs during installation of the tile with a Hoes Trenching Machine as a process of excavation and redeposit -- "substantial disturbance and redeposition of dredged material." EPA Region V App. Br. at 3. As described by EPA Region V, "Excavation by the machine involves the removal of soil which subsequently falls back to the ground, some into the trench and some to the sides of the trench. Most of the soils on the side of the trench are then replaced into the trench by discs on the back of the trenching machine. A tractor with an attached blade returns remaining excavated soil to the trench."[13] *Id.* at 2. EPA Region V argues that this process constitutes an "addition" and hence a "'discharge of pollutants' under prevailing case law." *Id.* at 3. As for *NMA*, EPA Region V takes the position that "the facts of the *NMA* decision are clearly distinguishable from the facts in the instant matter, rendering the *NMA* injunction inapplicable to this matter." *Id.* In particular, EPA Region V contends that the court in *NMA* was concerned only about "incidental fallback," involving only small quantities of soil, whereas Slinger "redeposited the *entire* amount of excavated material (all 2900 cubic yards of it) into the wetland." *Id.* at 8. EPA Region V adds, "There is, moreover, nothing accidental about these redeposits. The material did not merely fall back on its own incidental to the act of excavation, but instead was first removed and then mechanically redeposited into the trench." *Id.* EPA Region V argues

[13]EPA Region V also maintains that "[a] portion of the excavated soils remains on the side of the trench." EPA Region V App. Br. at 2. This contention is not, as explained *supra* note 4, supported by the record.

that the Presiding Officer's finding of liability and assessment of a $90,000 penalty should be upheld.

Before discussing the specific merits of Slinger's appeal, we turn first to a focused examination of EPA's and the Corps' regulatory authority over drainage of wetlands that are part of the waters of the United States. Overlaying this discussion is the statutory background discussed earlier, which premises regulatory jurisdiction on a discharge of a pollutant into waters of the United States and, in the case of discharges involving excavated or dredged materials, the section 404 permitting requirements of the Act.[14]

II.

EPA and the Corps have implemented section 404 of the Act by issuing regulations that describe, often in very general terms, the types of activities that are subject to the section 404 permitting requirement.[15]

---

[14]As noted previously, section 404(a) of the CWA authorizes the Secretary of the Army to issue permits for "the discharge of dredged or fill material into the navigable waters at specified disposal sites." A section 404 permit is mandated for discharges of dredged or fill material by operation of section 301(a) of the CWA, which declares unlawful the "discharge of any pollutant" by any person unless in compliance with certain specific provisions of the CWA, one such provision being section 404. The term "discharge of a pollutant" is defined by the CWA as constituting "any addition of any pollutant to navigable waters from any point source." CWA § 502(12), 33 U.S.C. § 1362(12). The term "pollutant" is in turn defined by the CWA to mean, inter alia, dredged spoil, i.e., dredged material. CWA § 502(6), 33 U.S.C.§ 1362(6).

[15]Some commentors on the Tulloch Rule drew a distinction between activities and discharges, asserting that the Rule attempts to regulate activities, whereas the CWA only authorizes the government to regulate discharges. 40 Fed. Reg. 45,008, 45,011 (Aug. 25, 1993). EPA and the Corps rejected this contention, responding as follows:

> EPA and the Corps agree with the point made by these commentors that the presence of a "discharge" into waters of the

(continued...)

These activities are described both in terms of what they include and what they exclude, and are set forth in a lengthy definition of the term "discharge of dredged material." 40 C.F.R. § 232.2. The prime included activity is "[t]he addition of dredged material to a specified discharge site located in waters of the United States." 40 C.F.R. § 232.2. Examples of excluded activities are "[a]ny incidental addition, including redeposit, of dredged material associated with any activity that does not have or would not have the effect of destroying or degrading an area of waters of the U.S." (subject to a no-effects demonstration requirement in certain cases), and "normal farming * * * activities such as plowing, seeding, cultivating, *minor drainage*, and harvesting." *Id.* (emphasis added).

Drainage of wetlands is not explicitly mentioned as one of the activities that is included within the section 404 permitting requirement. Nevertheless, it is beyond cavil that the broad definition of "discharge of dredged material," 40 C.F.R. § 232.2, encompasses at least certain forms of wetlands drainage activities that involve a discharge of dredged

---

[15](...continued)
U.S. is an absolute prerequisite to an assertion of regulatory jurisdiction under Section 404. Based on the clear language in section 301(a) of the CWA, this has been the agencies' longstanding position, and we are not altering that view in this rulemaking. For the reasons explained in this preamble, the agencies believe that addition or redeposition of dredged material in the course of activities such as mechanized landclearing, ditching, channelization and other excavation meets the discharge requirement of section 301(a). Because this rule will only regulate activities where the jurisdictional prerequisite of a "discharge" is present, EPA and the Corps disagree with commentors who argued that this rule is outside the scope of the agencies' authority under Section 404.

> Commentors are therefore flatly incorrect that this rule would trigger Section 404 jurisdiction over a discharge based upon the environmental effect of the associated activity.

Id.

material. This conclusion is the only reasonable inference to draw from the explicit *exclusion* of "minor drainage" in the statute from the permitting requirement. *See* CWA § 404(f)(1)(A), 33 U.S.C. § 1344(f)(1)(A). The implementing regulations are premised with this conclusion in mind. For example, in defining exempted minor drainage, the regulations refer, inter alia, to "[c]onstruction * * * of upland (dryland) facilities, such as ditching and tiling" that are incidental to normal farming operations and that "involve no discharge of dredged or fill material into waters of the United States." 40 C.F.R. § 232.3(d)(3)(i)(A). As further provided in the regulations, minor drainage expressly excludes conversion of wetlands to non-wetlands, for the obvious reason that the drainage in that instance is patently not minor, given its effect on the wetland.

> (ii) Minor drainage in waters of the United States is limited to drainage within areas that are part of an established farming or silviculture operation. It does not include drainage associated with the immediate or gradual conversion of a wetland to a non-wetland (e.g., wetland species to upland species not typically adequate to life in saturated soil conditions), or conversion from one wetland use to another (for example, silviculture to farming).

40 C.F.R. § 232.3(d)(3)(ii). The inference to be drawn from the foregoing exclusions from the minor-drainage definitions is that the drafters of the regulations, as well as the statute, assumed that a section 404 permit would be required for all other drainage activities that result in a discharge of dredged or fill material into waters of the United States (hereafter sometimes referred to as "non-minor drainage"). As explained in the Senate Report,

> Minor drainage is intended to deal with situations such as drainage in Northwestern forests or other upland areas. The exemption for minor drainage does not apply to the drainage of swampland or other wetlands.

S. Rep. No. 95-370, at 76 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4326. There is little doubt that Congress was concerned over the loss of wetlands to agriculture and to land developers. *Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897, 923 (5th Cir. 1983) ("Congress recognized the importance of protecting wetlands").[16]

Requiring a section 404 permit in most instances for non-minor drainage of wetlands is a fairly unremarkable proposition in view of the language and structure of the statute and regulations. In fact, EPA and the Corps assume as much, for they have seen little need to adopt explicit regulations mentioning wetlands drainage. For example, in the two agencies' discussion of comments on the Tulloch Rule, they expressed no need to promulgate additional regulations covering the placement of drainage tiles:

> One commentor indicated that the preamble [to the Tulloch Rule] should clarify that the excavation of wetlands to place drainage tiles should be regulated

---

[16]Congressional interest in preventing the loss of wetlands is not limited to the CWA.

> In order to combat the disappearance of wetlands through their conversion into crop lands, Congress passed a law known commonly as "Swampbuster." Food Security Act of 1985, Pub. L. No. 99-198, §§ 1201, 1221-23, 99 Stat. 1354, 1504-08 (codified as amended at 16 U.S.C. §§ 3801, 3821-24). This law did not make illegal the conversion of wetlands to agricultural use, but did provide that any agricultural production on a converted wetland would cause the farmer to forfeit his eligibility for a number of federal farm-assistance programs. Among the exemptions to provisions of Swampbuster is one for wetlands that had been converted to agricultural production before December 23, 1985. See § 3821(d). The farming of such previously converted wetlands does not make the farmer ineligible for benefits.

Gunn v. U.S.D.A., 118 F.3d 1233 (8th Cir. 1997).

> under Section 404 since this involves a discharge and destroys wetlands. *The excavation of wetlands to place drainage tiles is currently regulated under Section 404 unless such activities qualify for a Section 404(f) exemption*.[17] Activities that involve replacing existing field drainage tiles where the replacement does not increase the extent of drainage beyond that provided by the original tiling would generally qualify for such an exemption.

40 Fed. Reg. 45,008, 45,025 (Aug. 25, 1993) (emphasis added).

Notwithstanding the CWA's inclusion of certain non-minor drainage of wetlands within the section 404 permitting requirement, it is equally apparent that the means by which the drainage of a wetland is accomplished may have a significant bearing on whether or not a specific drainage activity will require a permit. A permit is only necessary if there is a "discharge" of dredged or fill material into the waters of the United States; if drainage is accomplished by means not involving a discharge of dredged or fill material, no permit is required. For example, draining a body of water by means of a pump has been held not to involve a discharge of dredged or fill material and, hence, not to require a permit pursuant to section 404 prior to starting the draining. *Save Our Community v. EPA*, 971 F.2d 1155, 1165 (5th Cir. 1992) ("[T]he deliberate draining of a swamp is not a discharge of fill material."); Comment, *Pumping With the Intent to Kill: Evading Wetlands Jurisdiction Under Section 404 of the Clean Water Act Through Draining*, 40 *DePaul L. Rev.* 1059 (1981). As explained by the court in *Save Our Community*, "[t]he existence of discharge is critical. The discharge must be of effluent or dredged or fill material." 971 F.2d at 1162. Accordingly, the court held "that the wetlands draining activity per se does not require a section 404 permit under the CWA, as only

---

[17] *See infra* note 18 (discussing section 404(f)).

activities involving discharges of effluent [e.g., dredged or fill material] necessitate obtaining a permit." *Id.* at 1167.

EPA and the Corps concur, in general terms, with the decision in *Save Our Community*:

> Several commentors [on the Tulloch Rule] indicated we should regulate the pumping of water because pumping water from a wetland has the same effect as draining, and, according to the commentor, "the impact of draining would be considered an identifiable decrease" in functions and values of waters of the U.S. We believe that pumping water from a wetland or other waters of the United States would not, in and of itself, necessarily result in a discharge of dredged material. *See Save Our Community v. EPA*, 971 F.2d 1155 (5th Cir. 1992). * * * We do not believe that simply putting a pipe into a water of the United States, per se, would necessarily involve a regulated discharge.

40 Fed. Reg. 45,008, 45,025 (Aug. 25, 1993) (preamble to Tulloch Rule).

The test of whether a section 404 permit is required for a particular activity that takes place in, or impacts, a wetland obviously does not depend solely or, in some instances, even partially on the effects of the activity on the wetland, as the pumping example proves. With the exception of certain exempted activities (not applicable here),[18] the only

---

[18]Pursuant to CWA § 404(f), certain discharges of dredged or fill material, for example, "minor drainage," 40 C.F.R. § 232.3(c), which does not change the character of the wetland, *see* 40 C.F.R. § 232.3(b), are not prohibited. *See United States v. Huebner*, 752 F.2d 1235, 1241 n.9 (7th Cir. 1985) (agricultural exemptions from the section 404 permitting requirement are "narrowly defined activities" that "cause little or no adverse effects either individually or cumulatively"). In those instances, EPA and the Corps may look to the effects of the discharges in deciding what activities to exclude (exempt) from

(continued...)

consideration -- the regulatory *sine qua non* -- is whether a discharge of dredged material takes place. This is not to say that the "effects" of a particular activity are of no concern. In a broad sense effects are the driving force behind the entire regulatory scheme to protect wetlands. Section 404 was enacted in 1972 as part of a regulatory scheme whose purpose was "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA § 101, 33 U.S.C. § 125. The Supreme Court in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134 (1985), upheld "the Corps' ecological judgment" that regulatory activities intended to protect waters of the United States must include adjacent wetlands, for they function under the same hydrologic cycle.[19] Nevertheless, the pivotal consideration for purposes of deciding whether an individual activity is or is not subject to the section 404 permitting requirement is whether a discharge of dredged material takes place.

III.

Clearly, the drainage of the wetland area by Respondent Slinger Drainage, Inc. was intended to transform a wetland into dryland and thereby destroy its wetland characteristics so that it would be suitable for dryland crop production. But the central legal issue, as noted above, is not whether the drainage resulted in the destruction of a wetland; it is whether the installation of drainage tile, by means of a Hoes Trenching Machine, resulted in the discharge of dredged material into the wetlands, thereby constituting a discharge of pollutants into waters of the United

---

[18](...continued)
regulatory coverage, partly or completely. Slinger is not asserting entitlement to an exemption under these provisions of the Act and regulations.

[19]Another court has noted, "Congress purposely included nonnavigable inland wetlands in the definition of navigable waters because of their importance in the chain of travel of toxic pollutants. 4 LEGISLATIVE HISTORY 928 (statement of Sen. Muskie)." *United States v. Huebner*, 752 F.2d 1235, 1241 n.9 (7th Cir. 1985).

States and requiring a permit under section 404 of the CWA.[20] The case is one of first impression for the Board.

A.

The parties' positions on appeal have been shaped, in many respects, by their differing views on how the D.C. Circuit's decision in *NMA* impacts the present case. For that reason we will examine the court's opinion in some detail, despite the fact that the holding presented there is, in our view, largely inapplicable to the case at hand.

NMA upheld a district court's invalidation of the Tulloch Rule,[21] a rule promulgated by the Corps and EPA in 1993 in order to eliminate a de minimis exemption under an earlier rule. The earlier rule defined the term "discharge of dredged material" to mean "any addition of dredged material into waters of the United States," but it also excluded "de minimis, incidental soil movement occurring during normal dredging operations." 51 Fed. Reg. 41,206, 41,232 (Nov. 13, 1986). The Tulloch Rule removed the de minimis exception and expanded the discharge definition to include "any addition of dredged material into, including any

[20]Slinger does not so much dispute that the excavated material which the Hoes Trenching Machine redeposited was dredged material, that the Hoes Trenching Machine constitutes a point source, or that the area on which it conducted its tiling work is a wetland. Rather, according to Slinger, "The actual issue is whether or not the soil disturbed in placing tile by use of a Hoes Trenching Machine is disturbed in such a way as to fit within the definition of 'discharge' under the Clean Water Act." Slinger App. Br. at 5. As further elaborated by Slinger, "The issue is not whether there was a discharge of 'foreign' materials into the wetland. The issue is whether or not there was a 'discharge' into a wetland." *Id*. at 5-6.

[21]The Tulloch Rule derives its name from the settlement of a case by the name of *North Carolina Wildlife Fed'n v. Tulloch*, No. C90-713-CIV-5-BO (E.D.N.C. 1992).

redeposit of dredged material within, the waters of the United States."[22] 58 Fed. Reg. 45,008, 45,037 (Aug. 25, 1993). The rule was challenged immediately by trade associations whose members engaged in excavation and dredging activities and who were concerned that the rule covered incidental "fallback" of dredged material that occurs during normal dredging operations.[23] During dredging, soil and other matter are typically excavated from a site and then transported to some other location for disposal. The large shovels used in dredging operations inevitably produce a certain amount of "fallback," which is nothing more than residue from the shoveling that falls back into the dredge site in virtually the same location from which it was originally taken. It is apparently not possible or feasible to scoop material from the bottom of a body of water without having some of it fall back into the water.

The court of appeals in *NMA* took note of the inevitability of fallback and of the fact that section 404 does not, by its terms, apply to dredging and excavation per se; rather, it applies to the "discharge" of dredged and fill material. EPA Region V and the Corps, who were parties to the lawsuit, did not dispute these central findings. They confined their arguments to "redeposits" of dredged material, including incidental fallback, which they viewed as a discharge because fallback, according to the argument, represents an "addition" of dredged material to the waters. As related by the court of appeals in *NMA*,

> [A]ccording to the agencies, wetland soil, sediment, debris or other material in the waters of the United States undergoes a legal metamorphosis during the

---

[22]The Tulloch Rule defined "discharge of dredged material" to include "any addition, including any redeposit, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation." 33 C.F.R. § 323.2(d)(1)(iii); 40 C.F.R. § 232.2(1)(iii).

[23]*American Mining Congress v. United States Army Corps of Eng'rs*, 951 F. Supp. 267 (D.D.C. 1997).

> dredging process, becoming a "pollutant" for purposes of the Act. If a portion of the material being dredged then falls back into the water, there has been an addition of a pollutant to the waters of the United States.

145 F.3d at 1403. In support of their position, EPA and the Corps cited to several court decisions in which quantities of bottom material or wetland soils were removed (e.g., by means of excavation, dredging, landclearing, channelization, or ditching) from one location and redeposited in another, resulting in an "addition" of a pollutant to waters of the United States. *See, e.g., Avoyelles Sportmen's League v. Marsh*, 715 F.2d 897 (5th Cir. 1983) (landclearing of wetland by deliberately leveling sloughs filled with rainwater held to have constituted a discharge of fill material); *United States v. M.C.C. of Florida*, 722 F.2d 1501 (11th Cir. 1985) (propellers of tugboats cut into bottom of waterway and deposited bottom sediment on adjacent sea grass beds); *Rybachek v. EPA*, 904 F.2d 1276 (9th Cir. 1990) (placer miners excavated gravel from streambeds and, after extracting gold, discharged the leftover material back into the water); *Minnehaha Creek Watershed Dist. v. Hoffman*, 597 F.2d 617 (8 Cir. 1979) (construction of dams and riprap involved placement of material such as rock, sand and cellar dirt into jurisdictional waters).

The court did not question the analysis in these decisions but rather found them not particularly germane to the issue before it. Each involved a project entailing both excavation and significant redeposit rather than a project that had excavation as its goal but involved some incidental fallback. Thus, they were clearly distinguishable on the merits. *Avoyelles* did not involve a discharge of dredged material, but instead was concerned with discharge of fill material; *M.C.C. of Florida* was analytically similar to placement of excavated material at the side of a ditch, since the displaced material ended up on "adjacent" sea grass beds; *Rybachek* offered more assistance to the agencies' position but was ultimately rejected because the *Rybachek* court "identified the regulable discharge as the discrete act of dumping leftover material into the stream after it had been processed," and thereby was distinguishable from

incidental fallback, *NMA*, 145 F.3d at 1406; and *Minnehaha* "simply held that the construction of dams and riprap" were within section 404 purview because of the placement of material into the water.

Close examination of the holding in *NMA* reveals a deliberate effort by the court of appeals to fashion a narrow ruling. "We hold only that by asserting jurisdiction over 'any redeposit,' including incidental fallback, the Tulloch Rule outruns the Corps's statutory authority." 145 F.3d at 1405. It left open the possibility that the agencies might be able to draw a bright line between "incidental fallback on the one hand and regulable deposits on the other," specifically indicating that "a reasoned attempt by the agencies to draw such a line would merit considerable deference." *Id.* Despite the court's circumspection, certain themes nevertheless dominate its opinion and provide insight into its reasoning. First, it is absolutely clear that the court was ruling that *incidental* fallback did not constitute an "addition" of a pollutant to waters of the United States. It remarked, for instance, that the Tulloch Rule encompassed "a wide range of activities that cannot remotely be said to 'add' anything to the waters of the United States." *Id.* "Without * * * an amendment [to the statute to address the presence of the 'addition' language in the definition of discharge], the Act simply will not accommodate the Tulloch Rule." *Id.* at 1410. "We agree with the plaintiffs, and the district court, that the straightforward statutory term 'addition' cannot reasonably be said to encompass the situation in which material is removed from the waters of the United States and a small portion of it happens to fall back." *Id*. at 1404. "[W]e fail to see how there can be an addition of dredged material when there is no addition of material." *Id*.

Second, the court was obviously concerned about excavation per se not being within the regulatory ambit of the CWA. Indeed, the court cited the Corps' own concerns in this regard when, in 1986, it added an exemption to the permit requirement for "de minimis, incidental soil movement occurring during normal dredging operations." 51 Fed. Reg. 41,206, 41,232 (Nov. 13, 1986). As the Corps explained then:

> Section 404 clearly directs the Corps to regulate the discharge of dredged material, not the dredging itself.
>
> Dredging operations cannot be performed without some fallback. However, if we were to define this fallback as a "discharge of dredged material," we would, in effect, be adding the regulation of dredging to section 404 which we do not believe was the intent of Congress.

Id. at 41,210; *NMA*, 145 F.3d at 1402 (citing this statement by the Corps). The court, in its decision, agreed with the Corps' assessment of the practical effect of including fallback within the permitting requirement for discharges of dredged materials:

> Indeed, fallback is a practically inescapable by-product of all these activities. In the preamble to the Tulloch Rule the Corps noted that "it is virtually impossible to conduct mechanized landclearing, ditching, channelization or excavation in waters of the United States without causing incidental redeposition of dredged material (however small or temporary) in the process." 58 Fed. Reg. at 45,017. As a result, the Tulloch Rule effectively requires a permit for all those activities * * *.

145 F.3d at 1403.

Third, the court looked upon the two agencies' efforts in promulgating the Tulloch Rule as an impermissible attempt to cure limitations on the Corps' authority under section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403, which, unlike the CWA, confers jurisdiction on the Corps to regulate excavation per se in certain waters. Generally speaking, those waters are navigable in the traditional sense and thus cover fewer waters than those falling within the scope of the

CWA. In the court's view, the Corps, by regulating incidental fallback pursuant to the Tulloch Rule, was attempting to enlarge its authority to regulate excavation activities and fill in the jurisdictional gap between the Rivers and Harbors Act and the CWA "simply by declaring that incomplete removal constitutes addition." 145 F.3d at 1405. It rejected this approach, opining that the problem the two agencies were trying to correct required a legislative, not administrative, solution.

> There may be an incongruity in Congress's assignment of extraction activities to a statute (the Rivers and Harbors Act) with a narrower jurisdictional sweep than that of the statute covering discharges (the Clean Water Act). This incongruity, of course, could be cured either by narrowing the jurisdictional reach of the Clean Water Act or broadening that of the Rivers and Harbors Act.

145 F.3d at 1404.

Based on the foregoing analysis of *NMA*, it seems apparent that *NMA* is dealing with a distinctly different fact and analytical pattern than is presented in the case at hand. *NMA* is addressing a fact pattern involving incomplete removal of material from waters of the United States, whereas here, in *Slinger*, the entirety of the material that is removed is redeposited. In *NMA* there is a net reduction in the amount of material previously located in the excavation site, whereas here there is no reduction. As stated by the court, "[b]ecause incidental fallback represents a net withdrawal, not an addition, of material, it cannot be a discharge." *NMA*, 145 F.3d at 1404. It further remarked:

> Although the Act includes "dredged spoil" in its list of pollutants, 33 U.S.C. § 1362(6), Congress could not have contemplated that the attempted removal of 100 tons of that substance could constitute an addition simply because only 99 tons of it were actually taken away.

145 F.3d at 1404. The situation in *NMA*, in short, involves an excavation without any significant "addition," i.e., redeposit, of dredged spoil to the excavation site. This is significantly different from the Slinger situation. Here we have an excavation, as in *NMA*, but the entirety of the excavated material is redeposited in the trench after the drainage tile is placed at the bottom of the trench. There are three readily discernible steps in the activities at issue in *Slinger*: excavation to make room for the drainage tile; placement of the drainage tile in the excavation site; and burial of the tile with the excavated material. While it is true that in *Slinger* the excavated material "falls back" into the trench (either by force of gravity or by mechanical operation of the Hoes Trenching Machine), the similarity between that process and the incidental fallback subject to the Tulloch Rule is largely superficial, for they in fact bear little factual or legal resemblance to each other -- the "addition" that is missing in *NMA* is present in *Slinger*. Moreover, the addition in *Slinger* is by no means incidental, since the quantity of material redeposited amounts to 100% of the material excavated and is essential to the successful completion of the project. As explained by Slinger, if the excavation site were not refilled with the excavated soil, (i) the drainage tile, being made of plastic, would likely "float up and not remain down at the bottom of the ditch" without the weight of the soil resting on top of it, Oral Arg. Tr. at 11, and (ii) the terrain would be difficult, if not impossible, to till, plant seed, and harvest due to the presence of open trenches in the field, *see id*. at 12-13. Thus, as conceded by Slinger, it was important to restore the surface to its earlier configuration in order to facilitate the farming operation in the field. In *NMA*, by contrast, the fallback is an unavoidable byproduct of excavation.

The analysis is not altered simply because the three steps in laying the drainage tile with a Hoes Trenching Machine occur nearly simultaneously. The essential process and result would be no different were Respondent to, for example, simply excavate the material by conventional means, haul it offsite temporarily while the tile is being laid, and then return the material to the site to refill the trench. The tile in either instance arrives at its ultimate destination (the bottom of the

trench) through a process of excavation and redeposit of large quantities of material.

Accordingly, for the foregoing reasons, we conclude that *NMA* is distinguishable from the situation presented by Respondent's operations and therefore not controlling. This is not a case where material is excavated and minuscule amounts inadvertently fall back, as was the situation addressed in *NMA*. This is a case where all of the excavated material -- more than 2,900 cubic yards according the Presiding Officer's calculations -- was purposefully returned to the site from which it was withdrawn. As noted previously, the *NMA* court commented that it would be inclined to defer to EPA and the Corps if they made a reasoned attempt to draw a bright line in a rulemaking proceeding between nonregulable incidental fallback and regulable redeposits. There is no reason to believe that, based on the reasoning and concerns expressed by the court, the redeposits in *Slinger* do not clearly fall on the regulable side of the line.[24] Thus, finding a basis for regulation in this case is entirely consistent with the court's reasoning in *NMA*.

B.

We turn next to a passage Slinger cites from Part IV of *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997). Part IV is one of several components of an intricately woven plurality decision that addresses

---

[24]When the two agencies revised the definition of discharge of dredged material in response to *NMA*, *see supra* note 10, they expressly stated, in reference to the court's "bright line" remarks, that the revision was not an "attempt[] to draw such a line here." 64 Fed. Reg. 25,120, 25,121 (May 10, 1999). They consequently deferred that task for a later time. "In the interim, we will determine on a case-by-case basis whether a particular redeposit of dredged material in waters of the United States requires a section 404 permit." *Id.* As noted in *SEC v. Chenery*, 332 U.S. 194, 203 (1947), "the choice made between proceeding by general rule or by individual *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency."

whether the practice of "sidecasting"[25] during the excavation of a wetlands drainage ditch constitutes an "addition" to waters of the United States. The quoted passage reads as follows:

> While the native soil is removed from the ditch and redeposited on the immediately adjacent land, the rational interpretation of the statute leads us to conclude that the movement of native soil a few feet within a wetland does not constitute the discharge of that soil into that wetland. The statute requires, in defining discharge of a pollutant, that the defendants have *added* dredged spoil to the wetland, the statutorily regulated water. While sidecasting moves excavated dirt from one particular locus in the wetland to another, it does not involve the addition of any material to the wetland. "Addition" requires the introduction of a new material into the area, or an increase in the amount of a type of material which is already present.

[25] Sidecasting is simply the practice of depositing excavated material alongside the trench, rather than removing it to a more distant location or allowing it to fall back into the trench.

133.F3d at 259.[26] Part IV acknowledges that the excavated material is a pollutant within the meaning of the CWA, but concludes that merely moving the excavated material a few feet from where it was originally located does not constitute an "addition" of pollutants to waters of the United States.

Although sidecasting is different in some respects from the trenching-and-redeposit process employed by Slinger, the analytical framework of Part IV (requiring the introduction of new material or additional amounts of the existing material), if adopted and followed in this case, would obviously mean that Slinger's operations would not require a permit. EPA Region V opposes applying the Part IV analysis to the instant proceeding, basing its opposition on the grounds that the quoted passage from *Wilson* was not endorsed by the other two judges

---

[26]The remainder of the paragraph from which the quoted passage is excerpted continues in the same vein but notes the existence of a contrary analysis in *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 923 (5th Cir. 1983):

> While soil may be definitionally transformed, through the act of excavation, from a part of the wetland into "dredged spoil," a statutory pollutant, it is not *added* to the site. Were we to adopt so expansive a definition of "discharge" that any movement of soil *within* a wetland constitutes "addition," we would not only flaunt the given definition of "discharge," but we would be criminalizing every artificial disturbance of the bottom of any polluted harbor because the disturbance moved polluted material about. If Congress intended to reach such conduct, it need simply to redefine the term "discharge." But as the statute is currently drafted, sidecasting does not involve the *addition* of pollutants to a water of the United States. *But see Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 923 (5th Cir. 1983) (holding that "addition," as included in the definition of "discharge," could include "redeposit" of dredged material which need not come from an outside source).

Wilson, 133 F.3d at 259-60.

who made up the three-judge panel that decided the case and thus represents the opinion of a single judge.

EPA Region V is correct that Part IV was not endorsed by either of the two other judges, and as a consequence Part IV is not controlling precedent even in the Fourth Circuit. One of the judges simply did not join in Part IV, and the other wrote separately on the sidecasting issue, expressing strong disagreement with the interpretation in Part IV. In his separate opinion, the latter judge, Judge Payne, examined in detail the text of the controlling regulations (defining dredged material and discharge of dredged material) and their regulatory history. He concluded that the regulations, from the outset of the implementation of section 404, "prohibited the addition into waters of the United States any material that was excavated or dredged from the waters of the United States without a permit to do so." 133 F.3d at 271. His conclusion included the following textual analysis of the regulations:[27]

> The regulations define "dredged material" to mean "material that is excavated or dredged *from* waters of the United States." 33 C.F.R. § 323.2(c). The "discharge of dredged material" was defined to mean "any addition of dredged material *into* the waters of the United States." (emphasis added). 33 C.F.R. § 323.2(d). Reading these two sections of the regulation together, it is rather clear that, without a permit to do so, one may not add *into* waters of the United States material that is excavated or dredged *from* waters of the United States. Hence, if the wetlands here at issue is a

[27]The regulations referred to in the opinion are those of the Corps, which are published in volume 33 of the Code of Federal Regulations but are virtually identical to those of EPA, which are published in volume 40 of the Code of Federal Regulations.

> "water of the United States" * * *, then §§ 323.2(c) and (d) clearly prohibit what the parties in this appeal agree to be sidecasting in these wetlands here at issue without a permit.

133 F.3d at 269. We are in complete agreement with this analysis. A textual approach to interpretation seems particularly felicitous in the present circumstances, since it promotes protection of wetlands consistent with congressional concerns over their loss, yet at the same time is in full accord with the limitations on the agencies' authority over activities that involve dredging but not discharges.

Judge Payne also examined the case law, including cases[28] relied upon by EPA and the Corps in *NMA* but which the court in *NMA* ultimately found to be distinguishable for purposes of its Tulloch Rule analysis, as discussed earlier. The holding in each of the cases supports the proposition that a redeposit of dredged material constitutes an addition of a pollutant -- and hence, a discharge of a pollutant -- into waters of the United States. Judge Payne cited those cases for that proposition,[29] and we think they also provide supporting authority for EPA Region V's position in the present case, notwithstanding the fact that the *NMA* court did not find them helpful to EPA's and the Corps' position in the context of the Tulloch Rule. The distinction between the two situations is clear:

---

[28] *See, e.g., Rybachek v. EPA*, 904 F.2d 1276 (9th Cir. 1990); *United States v. M.C.C. of Florida*, 722 F.2d 1501 (11th Cir. 1985)*; Avoyelles Sportmen's League v. Marsh*, 715 F.2d 897 (5th Cir. 1983);

[29] Judge Payne relied on the decisions in part because each, in addition to being based upon a textual analysis of the regulations, also looked to the adverse effects of the redeposits on the subject waters as a basis for concluding that a section 404 permit was required. We do not think it is necessary to go beyond a textual analysis of the regulations in order to conclude that a permit is required for the types of activities involved in those cases or in instant case. As noted earlier, the role of adverse environmental effects on wetlands is not pivotal for purposes of deciding whether or not a permit is needed.

Slinger's activities do not involve incidental fallback of negligible quantities of soil associated with excavation activity as under the Tulloch Rule, but instead involve the purposeful redeposit of 100% of the material excavated from the excavation site.

C.

The Presiding Officer in the case below cited *Avoyelles* and *Rybachek*, as well as a third case, *United States v. Sinclair Oil Co.*, 767 F. Supp. 200 (D. Mont. 1990), in support of his conclusion that Slinger's removal and redeposit of the excavated material constitutes a discharge under the CWA. Initial Decision at 6. As grounds for overturning the Presiding Officer's liability determination, Slinger argues that the cases are distinguishable, asserting that none is on point with the fact pattern in the present case and each involved extremely large-scale land clearing "where bottom soil from a wetland or stream was scraped and removed large distances for the specific purpose of filling other wetlands or altering the bottom of a stream. None of these cases, held that soil from within the wetland redeposited directly back into the same place in the wetland would constitute an 'addition'." Slinger App. Br. at 7.

Slinger is correct in noting these distinctions, but the distinctions by themselves prove little. The important point to be gleaned from each of the cases is that material taken from a particular body of water (wetland or stream) and redeposited into that same body of water, albeit not at the same exact location, is deemed a pollutant and its reintroduction into the body of water is deemed an addition of a pollutant to that body of water, thus constituting a discharge of a pollutant into waters of the United States. The fact that in those cases the removal site and the redeposit site are not identical does not prove that the cases are inapplicable; it simply points out that the case before us is one of first impression, which we are now called upon to decide. From the textual analysis of the regulations discussed above, we see that removal of material *from* waters of the United States is a legally discrete event that

is separate from the addition of that same material *into* waters of the United States.

The Presiding Officer's finding of liability against Slinger is fully supported by a textual analysis of the regulations. Dredged material, by its very nature, is something that has been removed "from" a body of water by dredging or excavation; it does not exist as such until it is removed from a body of water. Once it comes into existence, it becomes a pollutant as defined in section 502(6) of the Act. If it is subsequently redeposited "into" the same body of water, but at another location, the case law uniformly treats the redeposition as an addition of a pollutant to waters of the United States. The result should be no different when, as here, the dredged material is not just redeposited into the same body of water, but is also redeposited into the same location from which it was originally removed. There is nothing in the Act or regulations to suggest that dredged material in those circumstances, having once attained pollutant status, somehow loses that status upon redeposition into its former location. Redeposition of dredged material into a body of water constitutes the discharge of dredged material and, hence, an addition of a pollutant to waters of the United States for which a permit is required under section 404 of the Act.

Because Slinger did not have a permit at the time of the discharge,[30] we sustain the Presiding Officer's finding of liability. A Hoes Trenching Machine uses a chainsaw-type arm to remove the soil *from* the bottom of the wetland and then redeposits the soil back *into* the wetland, thus fulfilling the definitional requirements of the regulations. Accordingly, for the foregoing reasons, we also reject Slinger's contention that *Wilson* lends support to its position.

We turn now to consideration of the penalty assessed by the Presiding Officer against Slinger.

---

[30]Nor has Slinger shown entitlement on this record to an exemption under section 404(f) of the Act.

IV.

EPA Region V sought a civil penalty of $90,000 in the complaint it filed against Slinger. As related by the Presiding Officer in the initial decision, Slinger maintained that the penalty proposed in the complaint was unconscionable and inappropriate based on the facts of the case "but [it] offer[ed] no argument in support of its contentions." Initial Decision at 10. The Presiding Officer nevertheless proceeded to discuss a series of matters -- the nature and circumstances of the violation, the extent of the violation, the gravity of the violation, Slinger's ability to pay the penalty, its history of prior violations, culpability, economic benefit, and other factors as justice may require -- all of which are factors that must be separately considered before assessing a penalty under the CWA and the applicable regulations.[31] Upon consideration, he assessed a $90,000 civil penalty against Slinger, as requested in the complaint.

---

[31] As summarized by the Presiding Officer:

> Administrative penalties for violations of CWA § 301(a) are determined in accordance with CWA § 309(g). Section 309(g) (2) (B) provides for class II civil penalties of up to $10,000 per day for each day a violation continues and a maximum penalty of $125,000. Section 309 (g) (3) directs that "the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require" are to be considered in determining the amount of any penalty to be assessed. In addition, Consolidated Rule of Practice 22.27(b) provides that "if the Presiding Officer decides to assess a penalty different in amount from the penalty proposed in the complaint, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease." 40 C.F.R. § 22.27(b).

Initial Decision at 10.

We see no obvious errors in the Presiding Officer's penalty assessment, and, therefore, we see no reason to change his penalty assessment.[32] On appeal Slinger has maintained its stolid silence, asserting only that the penalty is "unconscionable," Slinger App. Br. at 10, and has elected to ignore the Presiding Officer's cue to supply further explanation to support its contention. The penalty is affirmed.

CONCLUSION

For the reasons expressed above, an administrative penalty of $90,000 is assessed against Slinger. Payment of the penalty shall be made within sixty (60) days of receipt of this final order, by cashier's check or certified check payable to the Treasurer, United States of America, and forwarded to:

EPA Region V
Regional Hearing Clerk
Post Office Box 70753
Chicago, IL 60673

So ordered.

---

[32] As we have repeatedly emphasized, in cases where, as here, "the Presiding Officer assesses a penalty that falls within the range of penalties provided in the penalty guidelines, the Board generally will not substitute its judgment for that of the Presiding Officer absent a showing that the Presiding Officer has committed an abuse of discretion or a clear error in assessing the penalty." *In re SchoolCraft Constr., Inc.*, CAA Appeal No. 98-3, slip op. at 22 (EAB, July 7, 1999), 8 E.A.D. ___ (citing *In re Pacific Ref. Co.*, 5 E.A.D. 607, 612 (EAB 1994); *In re Ray Birnbaum Scrap Yard*, 5 E.A.D. 120, 124 (EAB 1994)).